

## German FCO allows installment payment of cartel fine in mills cartel case

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On October 25, 2011, the Federal Cartel Office ("FCO") fined mills company VK Mühlen AG in the amount of € 23.8 million for price fixing and customer and market allocation with competitors regarding the sale of flour in Germany. In addition, the FCO found that the participants coordinated capacity reductions. This has been the FCO's first fine in the ongoing and very broad mills cartel proceedings. According to the FCO, further 40 companies are subject to the investigation.

It seems that VK Mühlen AG fully cooperated with the FCO during the investigation under the leniency program and could thus secure a fine reduction. In addition, the company agreed to a settlement with the FCO, which further lowered the fine. (Typically the settlement "bonus" can be up to 10% of the fine). However, no details on the amount of the reductions are published.

The settlement decision is noteworthy because the FCO apparently allowed VK Mühlen AG to pay the amount in five annual installments. The FCO press release does not explicitly mention this. However, it highlights that a fine is determined not only based on the duration and the seriousness of the infringement, but that the FCO also takes into account the economic viability of the company concerned and may allow installments and/or deferral of the fine payment. This reference is unusual. VK Mühlen AG in turn mentioned to the press that the FCO granted the five year installments for paying the fine due to limited economic viability. It also seems that the installment mechanism was part of the settlement. (And indeed, it may be easier to obtain this type of payment modality in a settlement context.)

While this is probably not the first case in which the FCO allowed installment payments, it is among the first cases in which this element became public. Compared to the European Commission, the FCO has provided very little to no guidance yet on how it addresses claims of inability to pay or financial difficulties. The topic is, however, on the agenda, given that the FCO continues to impose ever increasing fines and given the impact of the financial crisis. While the FCO acknowledges this phenomenon, it only briefly deals with the issue in its most recent Annual Report 2009/2010: The FCO clarifies that due to the highly detrimental effect of cartels on the economy and consumer welfare, it is not possible to refrain from adequately sanctioning these infringements. However, the FCO states that in calculating the fine, it would always take into account the company's economic viability so that no company would be driven into insolvency because of a cartel fine. To the extent that the company concerned can prove liquidity problems, the FCO can allow payment through installments or deferral.

This statement remains rather superficial, and most of the Commission's recent press releases on cartel fines include more guidance on the elements that are relevant for assessing inability to pay claims. It would be helpful if the FCO could outline its approach in more detail, both regarding the payment modalities as well as a possible reduction of the fine. While the approach may still be evolving, updates on the current thinking would at least increase transparency on the topic. So far, there is no case published that the FCO has ever lowered a fine due to inability to pay - which is another difference to the European Commission. From a policy perspective, it would be desirable to have a more or less harmonized approach in this respect throughout the ECN. Otherwise, the amount and payment terms of fines for the infringement of Article 101 TFEU may vary according to which authority deals with the case.